93-568

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ALLIED PRODUCTS CORPORATION,

Petitioner,

v.

RAYMOND RENKIEWICZ, personal representative of the estate of Eugene Renkiewicz, deceased, and JOSEPH and ETHEL L. NORTLEY, copersonal representatives of the estate of Mary Nortley Renkiewicz, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

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October 11, 1993

QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals erred in deciding that a Federal Bankruptcy Court could not authorize a sale of a debtor's assets free and clear of an unmatured claim.

2. Whether the Michigan Court of Appeals erred in deciding that a Federal Bankruptcy Court could not discharge a debtor from an unmatured claim.

3. Whether the plaintiffs' state court action is an impermissible collateral attack on a Federal Bankruptcy Court's order.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

Petitioner, Allied Products Corporation ("Allied Products")[1], seeks a writ of certiorari to review an opinion and order of the Michigan Court of Appeals which reversed an order of summary disposition granted by the trial court in favor of Allied Products.[2] Leave to appeal was denied by the Michigan Supreme Court.

1 Pursuant to Rule 29.1, Allied Products has no parent company and all of its subsidiaries are wholly owned.

2 The petitioner, Allied Products, was a defendant and appellee below. The other defendants in the action below, not petitioners here, are White Farm Equipment Company, Inc., Minneapolis-Moline, and the Board of County Road Commissioners for the County of Charlevoix.

OPINIONS BELOW

The order denying leave to appeal was entered by the Michigan Supreme Court on July 13, 1993 and is reprinted at Appendix C[3]. The October 19, 1992 opinion of the Michigan Court of Appeals is reported at 196 Mich. App. 309, 492 N.W. 2d 820 and is reprinted at App. A. The trial court's decision, per Charlevoix County Circuit Judge Richard M. Pajtas, dated October 8, 1990, is not reported and is reprinted at App. D.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 19, 1992. App. A. A timely motion for rehearing was denied on January 4, 1993. App. B. Leave to appeal to the Michigan Supreme Court was denied on July 13, 1993. App. C. This petition for a writ of certiorari is being docketed in this Court within 90 days from the denial of leave to appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES AND CONSTITUTIONAL PROVISIONS

Article VI, clause 2 of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[3] References to opinions and orders reprinted in the Appendix appear throughout the petition as "App.", followed by the relevant appendix page designations.

28 U.S.C. § 157 (1988), in pertinent part, provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under Section 158 of this title.
>
> (2) Core proceedings include, but are not limited to-
>
> (M) orders approving the use or lease of property, including the use of cash collateral.

28 U.S.C. § 1257(a) (1988) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any

commission held or authority exercised under, the United States.

28 U.S.C. § 1334 (1988) provides as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Section 101(5) of the United States Bankruptcy Code (11 U.S.C. § 101(5) (1988)) provides as follows:

> "Claim" means--
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Section 105(a) of the United States Bankruptcy Code (11 U.S.C. § 105(a) (1988)) provides as follows:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 363 of United States Bankruptcy Code (11 U.S.C. §363 (1988)) in pertinent part, provides as follows:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.
>
> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Section 1141(d) of the United States Bankruptcy Code (11 U.S.C. § 1141(d) (1988)) provides as follows:

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not --

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if -

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the court for relief under chapter 7 of this chapter.

STATEMENT OF THE CASE

This case involves a collateral state successor liability action brought against Allied Products, a purchaser of bankrupt assets, after a United States Bankruptcy Court ordered that Allied Products purchased the assets free and clear of all claims such as

the one involved here. The underlying action is a product liability suit concerning a 1973 Minneapolis-Moline tractor. Plaintiffs-Respondents filed suit against White Farm Equipment Company, Minneapolis-Moline, the Board of County Road Commissioners for the City of Charlevoix and Allied Products. Plaintiffs specifically alleged that Allied Products, which purchased some assets during White Farm Equipment Company's bankruptcy, was the successor corporation of White Farm Equipment Company ("White Farm") and, therefore, liable under Michigan law for any and all damages incurred as a result of the sale of products by White Farm.

In May 1985, a Chapter 7 involuntary bankruptcy petition was filed against White Farm in the United States Bankruptcy Court for the District of Kansas. App. f-3. In June 1985, venue was transferred to the United States Bankruptcy Court for the Northern District of Illinois and the case was subsequently converted into a Chapter 11 reorganization proceeding. App. f-3. In October 1985, White Farm entered into an asset acquisition agreement with Allied Products, subject to approval by the bankruptcy court. App. f-6. During that same month, the bankruptcy court entered an order approving the agreement and authorizing the sale. App. F. In that order, the bankruptcy court found that White Farm did not have sufficient capital, nor any reasonable likelihood of obtaining sufficient capital, to propose and consummate a Chapter 11 plan, absent a sale of its business and assets to a third party. App. f-7. The court further found that White Farm had not received any bona fide offers for the sale of its businesses or its assets which were worthy of consideration, other than the Allied Products' offer. App. f-7. Finally, the court observed that failure to approve the asset acquisition would result in White Farm filing a motion to convert its case to a Chapter 7 liquidation proceeding. App. f-8. The bankruptcy court concluded that there were compelling business reasons to authorize the sale and that approval of the

acquisition was in the best interests of White Farm, its creditors and other parties in interest. App. f-11.

In its October 1985 order, the bankruptcy court also made several important conclusions of law. App. f-9-12. First, it found that this asset acquisition was a core proceeding under 28 U.S.C. §157(b)(2)(M). App. f-9. Second, it possessed jurisdiction to authorize the sale pursuant to 28 U.S.C. §§1334(a), 1334(d) and 157(a). App. f-9. Third, specific statutory authority to approve the sale existed under 11 U.S.C. §§105(a), 363(b) and 363(f). App. f-9. Finally, Allied Products was a good faith purchaser under 11 U.S.C. § 363(m), and that the sale price was adequate under the circumstances. App. f-9-10.

The order approving Allied Products' acquisition specifically decreed that White Farm's assets would "immediately be transferred to Allied Products free and clear of all liens, claims, and encumbrances." App. f-12. The agreement, approved by the bankruptcy court, expressly and repeatedly disclaimed liability for any product liability claims. App. a-4-5. In fact, the purchase price of the White Farm assets acquired by Allied Products did not account for Allied Products assuming any liability for future unaccrued claims concerning White Farm products manufactured prior to October 9, 1985. The bankruptcy court retained jurisdiction to adjudicate, among other things, "all issues concerning liens, claims, encumbrances and alleged ownership interests with respect to the Reorganization Assets, including the extent, validity, enforceability, and priority of all such liens, claims, encumbrances and alleged ownership interests." App. f-11-13. The court also retained jurisdiction over disbursement of the "Excluded Cash Segregated Fund," a fund to be used "to, inter alia, satisfy (disburse funds equal to adjudicated value of such property interests) to the extent such liens, claims, encumbrances or alleged ownership interests are

held to be valid, enforceable, superior and paramount . . . ." App. f-13-14.

Subsequent to the authorization of the sale to Allied Products, the bankruptcy court confirmed a plan of reorganization between the official committee of unsecured creditors on November 11, 1987. App. a-3. The Chapter 11 proceeding is still pending and currently supervised by the United States Bankruptcy Court for the Northern District of Illinois under the caption In re White Farm (Civil Action No. 85 B 7532). App. a-3.

On December 15, 1987, the alleged accident occurred involving a 1973 Minneapolis-Moline tractor. App. a-3. On or about October 1989, plaintiffs filed their complaint against the defendants. App. a-4.

Relying on the bankruptcy court's prior orders, Allied Products moved for summary disposition, claiming no liability for the accident involving an allegedly defective tractor manufactured, distributed and sold by White Farm over ten years prior to the bankruptcy court authorized sale to Allied Products. The trial court granted Allied Products' motion, ruling that the 1985 Order of the United States Bankruptcy Court for the Northern District of Illinois, approving the sale of certain White Farm assets to Allied Products free and clear of claims concerning equipment manufactured prior to the sale date, barred any such future actions on such claims against Allied Products. App. D, E. The trial court held that the bankruptcy court's order preempted state law governing successor liability in situations involving an unaccrued future claim concerning a pre-October 1985 product. App. D. The Michigan Court of Appeals reversed. App. A. The court of appeals held, contrary to the findings of the bankruptcy court, that the bankruptcy court did not have jurisdiction to rule on related unmatured claims such as plaintiffs' product liability claim. Petitioner's timely motion for

rehearing was denied. App. B. Petitioner was also denied subsequent leave to appeal to the Michigan Supreme Court. App. C.[4]

REASONS FOR GRANTING THE WRIT

Summary Of Argument

In accordance with the plain language of the Bankruptcy Code, the United States Bankruptcy Court for the Northern District of Illinois properly exercised its jurisdiction and equitable powers in ordering that no liability could be imposed upon Allied Products for any product liability claim involving a White Farm product manufactured prior to October 9, 1985.

The Michigan Court of Appeals erred in framing the issue as whether the federal bankruptcy court had jurisdiction to discharge the debtor of an unmatured claim. The proper issue presented to the state court of appeals was whether the federal bankruptcy court had jurisdiction to authorize the sale of some White Farm assets to Allied Products free and clear of certain, limited unaccrued or unmatured claims. Assuming, arguendo, that the court of appeals properly framed the issue, the court erred in deciding that a federal bankruptcy court could not discharge a debtor from such a claim. It is clear, pursuant to the plain language of the Bankruptcy Code, a recent decision by this Court and numerous decisions by the federal courts, that a bankruptcy court has the jurisdiction to discharge a debtor from an unmatured claim.

Moreover, although the issue of whether a bankruptcy court is able to authorize a sale of assets free and clear of unmatured claims has polarized the federal courts of appeals, the clear weight of authority supports the bankruptcy court's ability

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[4] Justice Patricia Boyle would have heard the matters raised in this petition. App. c-2.

under the Bankruptcy Code to order a sale free and clear of such claims. Thus, the state court has decided an important and recurring question of federal bankruptcy law in conflict with the Bankruptcy Code and decisions by the federal courts of appeals.

The Supremacy Clause of Article VI of the United States Constitution empowers Congress to preempt state law. U.S. Const. Art. VI, Cl.2. Because plaintiffs' collateral state suit against Allied Products stands as an obstacle to the accomplishment and execution of the full objectives of Congress, as set forth in the United States Bankruptcy Code, plaintiffs' case clearly violates the Supremacy Clause. *See* Louisiana Public Service Comm'n v. F.C.C., 106 S.Ct. 1890 (1986). Plaintiffs' state law theory of successor liability based upon acquisition of a product line is simply inconsistent with more ancient federal bankruptcy principles based upon the sale of a debtor's assets to maximize the estate for the benefit of creditors. *See* In re Paris Industries Corp., 132 B.R. 504 (D. Me. 1991).

Once the United States Bankruptcy Court for the Northern District of Illinois entered its order, the jurisdiction of that court was established, except insofar as it could be attacked on direct appeal, or in the court of its rendition. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938); In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992). The Bankruptcy Court for the Northern District of Illinois specifically retained jurisdiction of this matter, and the Chapter 11 reorganization case is still pending. App. a-3; f-13-14. Thus, the Michigan Court of Appeals' decision to allow a collateral attack on a bankruptcy court's prior order and jurisdiction is in conflict with federal law and prior decisions of this Court.

I. The Michigan Court of Appeals' Decision Conflicts with Numerous Federal Court Decisions Holding That A Bankruptcy Court Has Jurisdiction To Authorize Sales Free And Clear Of Unmatured Claims.

The state court of appeals below characterized the sale free and clear of claims to Allied Products as a "discharge". App. a-10. A "discharge" under 11 U.S.C. §1141(d) refers to the dischargeability of the debtor. At issue in this case is the liability of the purchaser, Allied Products. The state court's discussion of how the plaintiffs' claims arose after confirmation of the plan concerns whether the plaintiffs may proceed against the debtor, not whether the plaintiff should be allowed to disturb the court-approved acquisition agreement and prior bankruptcy court orders. The court of appeals mischaracterized the issue and, thus, erroneously decided a federal question that conflicts with decisions by the federal courts of appeals.

The overwhelming number of federal courts of appeals and district courts interpreting the Bankruptcy Code support the proposition that a bankruptcy court has jurisdiction to order the sale of a bankrupt's assets free and clear of unmatured claims. *Compare* MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); Conway v. White Trucks, a Division of White Motor Corp., 692 F. Supp. 442 (M.D. Pa. 1988), *aff'd*, 885 F.2d 90 (3d Cir. 1989); Wallace v. Dorsey Trailers, Southeast, Inc., 849 F.2d 341 (8th Cir. 1988); Volvo White Truck Corp. v. Chambersburg Beverage, Inc., (In re White Motor Credit Corp.), 75 B.R. 944 (Bankr. N.D. Ohio 1987) (federal bankruptcy law preempts state law imposing successor liability on purchaser of assets); Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Industries Corp.), 132 B.R. 504 (D. Me. 1991) (same); *with* Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.), 730 F.2d 367 (5th Cir. 1984); Michigan Employment Security

Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.), 930 F.2d 1132 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1605 (1992).

Section 363 of the United States Bankruptcy Code provides that a bankruptcy court may authorize the sale of a bankrupt debtor's assets. Subsection (f) of Section 363 of the Bankruptcy Code specifically empowers a bankruptcy court to approve a sale "free and clear" of all claims against the assets. This section authorizes sales free and clear of specific interests in the property being sold, such as liens. Although the courts of appeals are in conflict as to whether a bankruptcy court can authorize a sale of assets free and clear of unsecured or unmatured claims, the majority of federal courts interpret the Code to allow a bankruptcy court to authorize sales free and clear of such post-petition claims. *See, e.g.*, In re Paris Industries Corp., 132 B.R. 504 (D.Me. 1991); In re White Motor Credit Corp., 75 B.R. 944 (Bank. N.D. Ohio 1987).

Aside from the bankruptcy court's authority pursuant to Section 363 of the Bankruptcy Code to authorize sales free and clear of unmatured claims, a Sixth Circuit court relied upon the bankruptcy court's broad equitable powers under the Code to authorize a sale free and clear of a post-petition inquiry. The bankruptcy court in In re White Motor held that:

> [a]bsence of specific statutory authority to sell free and clear poses no impediment. This authority is implicit in the court's general equitable powers and its duty to distribute debtor's assets and determine controversies thereto. Van Huffel v. Harkelrode, 284 U.S. 225, 52 S.Ct. 115, 76 L. Ed. 256 (1931). Authority to conduct such sales is within the court's equitable powers when necessary to carry out the provisions of Title II. 11 U.S.C. §105(a).

In re White Motor Credit Corp., 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987); *see* In re U.N.R. Industries Inc., 725 F.2d 1111, 1119 (7th Cir. 1984) (stating that equitable power of the bankruptcy court might be broad enough to make provision for future claims).

The United States District Court for the Middle District of Pennsylvania, affirmed by the Third Circuit Court of Appeals, followed the White Motor court's analysis. Conway v. White Trucks, a Div. of White Motor Corp., 692 F. Supp. 442, 455 (M.D. Pa. 1988), *aff'd.*, 885 F.2d 90 (3d Cir. 1989). Further, the Conway court did not find Mooney, supra, to be an obstacle: "... it appears the Mooney decision does not prohibit the Bankruptcy Court's use of its general equitable powers to channel claims and sell assets free and clear. 11 U.S.C. §105(a)".[5]

The Second Circuit Court of Appeals has also held that a bankruptcy court's power extends to channeling or confining claims which could otherwise be asserted against third parties to the debtor's estate. MacArthur Co. v. Johns - Manville Corp., 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988). Thus, in MacArthur, the Second Circuit allowed the bankruptcy court to sell assets free and clear where "Manville faced the possibility of

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5 A prominent bankruptcy scholar has agreed with the conclusions reached in Conway and White Motor that a bankruptcy court has authority to approve sales free and clear of post-petition claims. Professor David Gray Carlson argues that Section 11 U.S.C. § 363(f)(5) of the Bankruptcy Code should be read to permit the foreclosure of future claimants from proceeding against successor corporations where a fund is created to which the future plaintiffs' ratable share of cash proceeds would be paid. *See* David G. Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability and Toxic Waste Cleanup*, 50 Law & Contemp. Probs. 119, 127-31 (Spring 1987). In so commenting, Professor Carlson also found support in the Third Circuit's decision in *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985) (allowing class representative for future tort creditors without deciding that future tort creditors have "claims").

suits by tens of thousands of as yet unknown asbestos victims." 837 F.2d at 90.

The sale of assets to Allied Products provided for an Excluded Cash Segregated Fund. App. f-13-14. The bankruptcy court, which had jurisdiction over all "claims," may have had the authority to order claimants with unmatured claims, such as plaintiffs, to stand in line with other creditors to receive disbursements from such a segregated fund. App. f-13-14. Plaintiffs should not be permitted to interfere with the bankruptcy court's jurisdiction to estimate and provide for treatment of "claims" which are part of a core proceeding. Allied Products did not impair any claimant's remedies, but increased their ability to recover from the proper responsible party, the debtor. See In re Amatex Corp., 755 F.2d 1034, 1036 (3d Cir. 1985) (approving appointment of representative to assert interests of "future" tort claimants in Chapter 11 case); In re Johns-Manville Corp., 36 B.R. 743, 745-746 (Bankr. S.D.N.Y. 1984) (providing for future claimants through trust funds created under the plan).

The Eighth Circuit Court of Appeals in Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341 (8th Cir. 1988), addressed a situation on all fours with petitioner's own case. In Wallace, decedent's relatives brought, inter alia, a wrongful death action against the purchaser of a debtor's assets in bankruptcy, arising out of the decedent's alleged operation of an aerial lift manufactured by the debtor. The lift was manufactured in 1962. The relevant petition in bankruptcy was filed in 1979 and the assets sold to purchasers in 1979. Plaintiffs' decedent was not killed until 1984. In light of these facts, the Eighth Circuit held that, "The unequivocal disclaimer of liability, coupled with the explicit language of the bankruptcy court's order, make it clear that [the purchaser] did not expressly or impliedly assume any liabilities of [the manufacturer], either fixed or contingent." 849 F.2d at 343. The Court of Appeals affirmed summary judgment for the defendant.

As a matter of federal bankruptcy law, Allied Products acquired the assets purchased from White Farm free and clear of plaintiffs' claims. The Michigan Court of Appeals, however, failed to address Section 363 of the Bankruptcy Code, misinterpreted the plain language of Section 105(a) and ignored relevant decisions by the federal courts of appeals reaching a contrary result.

Moreover, the state court of appeals disregarded important overriding policy considerations under federal bankruptcy law. The protection federal bankruptcy law affords asset purchasers serves an important policy of improving the market of the assets of a bankrupt company, thus benefiting all creditors. This policy serves seller, purchaser, and potential claimant alike.

The sale of assets free and clear is appropriate in a bankruptcy proceeding since it allows the trustee to sell the assets at a fair price so that the debtor is not forced to compensate for potential liability:

> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability.

In re White Motor Credit Corp., 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987); *see* Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631 (W.D.N.Y. 1977), *aff'd on other grounds*, 584 F.2d 4 (2d Cir. 1978); American Living Systems v. Bonapfel (In re All-American of Ashburn, Inc.), 56 B.R. 186 (N.D. Ga. 1986), *aff'd on other grounds*, 805 F.2d 1515 (11th Cir. 1986); Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.), 19 B.R. 323

(Bankr. W.D. Wash. 1982). The imposition of successor liability, therefore, defeats the purpose of bankruptcy proceedings to grant debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

The trial court below specifically recognized, as did the bankruptcy court, the need for a sale free and clear of such claims to Allied Products:

> If a perspective [sic] purchaser can't go to a defunc [sic] company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a chapter 7 state [sic] bankruptcy liquidation.

App. e-4.

Allowing sales free and clear of claims also serves to preserve the expectations of the purchaser who relied upon the order of a federal court. This reliance and the finality that underlies it was the basis of a recent decision by the Seventh Circuit Court of Appeals. In re Edwards, 962 F.2d 641 (7th Cir. 1992). In Edwards, property of a bankruptcy debtor had been sold free and clear of all liens. A creditor holding a second lien against the property did not receive notice of the sale. The creditor argued that, despite the court order approving the sale free and clear of all liens, its lien survived because it had received no notice of the sale.

The Seventh Circuit Court of Appeals recognized the constitutional merits of the creditor's argument that a property

right cannot be destroyed or altered without notice. The court concluded, however, that the need to protect one who purchases assets in a bankruptcy court approved sale overrode the creditor's constitutional claim:

> To take away a person's property - and a lien is property - without compensation or even notice is pretty shocking, but we have property rights on both sides of the question here, since [the creditor] wants to take away property that [the purchaser] bought . . . As we said before, the liquidation of bankruptcy estates will be impeded if a bona fide purchaser cannot obtain good title, and creditors will suffer. The strong policy of bankruptcy sales embodied in Section 363(m) provides, in turn, strong support for the principle that a bona fide purchaser at a bankruptcy sale gets good title. . . .

962 F.2d at 645.

A bankruptcy court is, therefore, not precluded from protecting a *bona fide* purchaser, such as Allied Products, merely because the claimants lacked notice:

> The purpose of notice to creditors and other parties-in-interest when bankruptcy assets are to be sold, is to insure that the sales price is fair and that the funds flowing into the bankrupt estate for distribution among creditors or for other purposes are the most that could be realized from the assets sold.

In re Paris Indus. Corp., 132 B.R. 504, 509 (D. Me. 1991). These goals were met, as set forth in the detailed findings of fact by the bankruptcy court. App. f-3-9.

The facts in the Paris case were parallel to those in the instant case, because the claimants had received no notice and the accident had not yet occurred. Nonetheless, the Paris court found that the claimants had lost nothing by virtue of the sale. In fact, the Paris claimants still had their claim against the estate, regardless of the sale:

> As the Third Circuit has observed, the notice argument "primarily provides a justification for permitting [a claimant] to file a late proof of claim with the bankruptcy court or to avoid the discharge . . . rather than a justification for imposing successor liability on [the asset purchaser]."

132 B.R. 504, 510 n. 13 (quoting Conway v. White Trucks, 885 F.2d 90, 96 (3d Cir. 1989)). It is undisputed by the parties that the White Farm bankruptcy proceeding is still pending. App. a-3.

Significantly, the Paris court remarked: "The irony of [the claimants'] argument is that they would not even be able to make their claim against [the purchaser] were it not for the sale, for it is only by the sale of assets and the doctrine of successor liability that they can even assert such a claim." 132 B.R. 504, 510. As in Paris, the instant case is about responsibility. The effect of the bankruptcy court's order was to decree that with respect to any future claims that may arise out allegedly defective products manufactured and sold by the debtor prior to October 1985, such claims may not be asserted against the purchaser -- who until the purchase is a stranger, who but for the alleged purchase would remain a stranger, and who would not become a purchaser without the insulation which the court's order provides him -- but can only be made against the actual responsible party, the debtor. *See* App. a-4. The sale of assets did not extinguish or otherwise affect the rights of the plaintiffs to pursue their claims against the

debtor. The only effect of the court-approved sale of assets to Allied Products is to preclude the plaintiffs from seeking to impose responsibility upon Allied Products for the alleged torts of White Farm.

II. Federal Courts Are In Conflict Over Whether A Bankruptcy Court Can Discharge A Debtor From Unmatured Claims.

Assuming the Michigan Court of Appeals correctly framed the issue, the court erred when it held that a United States Bankruptcy Court could not discharge a debtor from an unmatured claim. Although the treatment of unmatured claims in the discharge of a debtor has polarized the federal courts of appeals, the weight of authority supports the ability of federal bankruptcy courts to discharge a debtor of unmatured claims. *Compare* In re Chateaugay Corp. ("LTV"), 112 B.R. 513 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991); In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985); Grady v. A.H. Robins Co., Inc. (In re A.H. Robins Co.), 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd other grounds*, 839 F.2d 198, 199 (4th Cir.), *cert. dismissed sub nom.*, Joynes v. A.H. Robins Inc., 487 U.S. 1260 (1988)[6] *with* Schweitzer v. Consolidated Rail Corp. (In re Central R. Co. of New Jersey), 758 F.2d 936, 944 (3d Cir.), *cert. denied sub nom.*, Reading Co. v. Schweitzer, 474 U.S. 864 (1985); Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.), 730 F.2d 367 (5th Cir. 1984).[7] This conflicting interpretation of the Bankruptcy Code is an important and recurring question of federal bankruptcy law that this Court should resolve. *See* In re U.N.R. Industries, Inc., 29 B.R. 741,

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[6] *Accord* Roach v. Edge (In re Edge), 60 B.R. 690 (M.D. Tenn. 1986); In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986); In re Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (D.C.N.Y. 1984).

[7] *See* Pettibone Corp. v. Ramirez (In re Pettibone Corp.), 90 B.R. 918 (Bankr. N.D. Ill. 1988).

745 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), *on remand*, 46 B.R. 671 (Bankr. N.D. Ill. 1985).

The Michigan Court of Appeals held that because the reorganization plan was confirmed before the time plaintiffs' claims arose, the bankruptcy court did not have jurisdiction to discharge those claims under 11 U.S.C. § 1141(d). App. a-9-10. Section 1141(d) provides, in relevant part, that a bankruptcy court can discharge a "claim." The state court's narrow interpretation of the term "claim" in the federal Bankruptcy Code is in conflict with the plain language of the Code itself, a prior decision of this Court, as well as numerous decisions by the federal courts of appeals.

Previously, under the Bankruptcy Act, tort claimants were often unable to meet the provability requirement of showing the reasonable estimation or liquidation of their claim. Therefore, nonprovable claims were precluded from discharge and the claimant was able to pursue his claim after discharge. The current Bankruptcy Code, however, abolished the provability requirement and enacted §101(5)'s broad definition of "claim."[8] Based upon this broad mandate, which was ignored by the Michigan court of appeals, courts have recognized that a plaintiff's not-yet-discovered rights can exist even if unmatured under applicable state law at the time of the petition; thus plaintiffs' unmatured claim falls within the express language of § 101(5).

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8 Section 101(5) defines a claim as a--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Federal courts have broadly construed the definition of "claim" under the Bankruptcy Code in order to effectively address the problem of unmatured claims in discharge. See, e.g., In re Chateaugay, supra. The Supreme Court itself recently observed "it is apparent that Congress desired a broad definition of a 'claim' and knew how to limit the application . . . when it desired to do so." Ohio v. Kovacs, 469 U.S. 274, 279 (1985).

The courts have set forth a sound rationale to explain why unmatured claims such as plaintiffs' here, can be discharged by a bankruptcy court. First, under bankruptcy law rather than state law, the claim arises upon establishment of the relationship between the debtor and the creditor. Therefore, the claim actually arises based upon the debtor's conduct prior to the filing of the bankruptcy petition. For example, in In re Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986), the court held that a claim arises at the earliest point in the relationship between the victim and the wrongdoer. Thus, plaintiff's claim for negligent dental services was recognized as a "claim" able to be discharged in bankruptcy, even though the negligence was undiscovered until after the petition was filed. The court explained that although the plaintiff's injury may not have manifested itself until post-petition, with no prior right of access to the state courts, for bankruptcy purposes, the "right to payment" arises at the time of the negligent act. Here, as in Edge, the alleged negligent act occurred pre-petition with the alleged negligent manufacture, distribution or sale of an allegedly defective 1973 product.[9] *Accord* In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986), (finding the operative time for determining a "claim" to be the pre-petition sale of defective goods by Johns-Manville to the creditors); In In

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[9] The court in In re Pettibone Corp., 90 B.R. 918 (Bankr. N.D. Ill. 1988), distinguished itself from cases, such as the instant one, where "there was some pre-bankruptcy privity, contact, impact, or hidden harm to the ultimately injured plaintiff or indemnity claimant." Id. at 931. Unlike plaintiff here, the plaintiff in In re Pettibone had no such pre-bankruptcy contact.

re A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd other grounds*, 839 F.2d 198, 199 (4th Cir. 1988) (holding that the right to payment arose when the Dalkon Shield was inserted into claimant, although the injury did not manifest until post-petition); In re Chateaugay Corp. ("LTV"), 112 B.R. 513 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991) (holding the prepetition triggering event, (i.e. the threatened release of hazardous waste) caused the environmental claim to arise even though the injury occurred post-petition).

Some courts, such as the Fifth Circuit in In re Mooney Aircraft, Inc., 730 F.2d 367 (5th Cir. 1984), have declined to recognize a "claim" in advance of some manifestation of injury.[10] The Michigan court of appeals relied on the Mooney decision in reaching the surprising conclusion that a federal bankruptcy court did not have jurisdiction in a Chapter 11 proceeding to discharge the debtor of certain products liability claims even though the product at issue was manufactured over ten years prior to the court authorized sale.

The state court's heavy reliance on Mooney is misplaced. The Mooney decision was concerned with a liquidation sale under Chapter 7 of the Bankruptcy Act of July 1, 1898, entailing a procedure whereby the money is collected and promptly distributed to known creditors who have filed claims. As a Third Circuit court pointed out, "Mooney did not address the issue of claims under the current code nor a court's authority to effect a discharge in Chapter 11 reorganization which provides a debtor and a court the opportunity to make provisions for unknown creditors and unknown claims." Conway v. White Trucks, 692 F.

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10 See Schweitzer v. Consolidated Rail Corp. (In re Central R. Co. of New Jersey), 758 F.2d 936, 944 (3d Cir. 1985) (plaintiffs' future F.E.L.A. claims based on asbestos exposure were not dischargeable claims under Section 77); Pettibone Corp. v. Ramirez (In Re Pettibone Corp.), 90 B.R. 918 (Bankr. N.D. Ill. 1988) (under non bankruptcy law, the cause of action did not exist until injury occurred).

Supp. 442, 454 (M.D. Pa. 1988), *aff'd*, 885 F.2d 90 (3d Cir. 1989).[11]

The Michigan Court of Appeals ignored the plain language of the current Bankruptcy Code, failed to address the recent decision by this Court in Kovacs, misconstrued the applicability of Mooney, and ignored relevant federal courts of appeals' decisions.

III. The Supremacy Clause Of The United States Constitution Prohibits Imposition Of State Successor Liability Law Upon A Purchaser Of A Bankrupt's Assets When A United States Bankruptcy Court Has Ordered That The Purchaser Takes Such Assets Free And Clear Of Unmatured Claims.

Plaintiffs' collateral action is a direct challenge to the bankruptcy court's 1985 order, in which the court barred products liability actions such as this one against Allied Products. The bankruptcy court had clear core jurisdiction over such actions affecting the bankrupt's estate. App. f-9. Not only will the collateral challenge affect potential sales of assets in all estates arising in bankruptcy and erode the ability of trustees and debtors-in-possession to sell estate assets, it may arguably provide Allied Products with grounds for seeking rescission of the 1985 sale, having bargained for a sale free and clear of liability. *Accord* In re Paris Industries, 132 B.R. at 507. By allowing such a collateral attack, the Michigan Court of Appeals is acting contrary to the United States Bankruptcy Code and federal court decisions.

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[11] The Ninth Circuit Court of Appeals has also counseled against such misplaced reliance on Mooney. See Nelson v. Tiffany Industries, Inc., 778 F.2d 533, 537 n.7 (9th Cir. 1985).

The Bankruptcy Court for the Northern District of Illinois specifically found in its 1985 order that it had jurisdiction. In its conclusions of law it found that:

> This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(M).
>
> This court has jurisdiction to authorize consummation of the Allied Products acquisition transaction pursuant to 28 U.S.C. §§ 1334(a), 1334(d) and 157(a).
>
> This court has specific statutory authority to authorize consummation of the Allied Products acquisition transaction pursuant to 11 U.S.C. §§ 105(a), 363(b) and 363(f).

App. f-9. This jurisdiction extended to any or all proceedings "arising in or related to" the White Farm bankruptcy case under Title 11. 28 U.S.C. § 157(a). The "related to" language has been read as incorporating any proceeding whose outcome "could conceivably have any effect on the estate being administered in bankruptcy." In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264-68 (3d Cir. 1991); In re Paris Indus. Corp., 132 B.R. 504, 507-08 (D. Me. 1991); In re Korhumel Industries Inc., 103 B.R. 917, 920-24 (N.D. Ill. 1989); 1 Collier on Bankruptcy ¶ 3.01 at 3-28 (1991). Thus, the Bankruptcy Court had jurisdiction over related matters including any claim against a purchaser of the bankrupt's assets based on activities of the bankrupt. See Julian v. Central Trust Co., 193 U.S. 93 (1904).

As the court of appeals recognized below, the bankruptcy proceeding is still pending. App. a-3. The bankruptcy court ordered that it would retain jurisdiction to "interpret and enforce the terms and provisions of [its] Order. . ." App. f-13. Thus, any

state court decision disturbing the bankruptcy court's prior order is a collateral attack.

Moreover, even assuming, arguendo, that the bankruptcy court did not have jurisdiction, this collateral attack in the Michigan state courts is wholly improper. It is well-settled that a court that issued an order in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack, like any other erroneous, but final, judgment. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1939); Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938); In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992); *see* Dooley v. Weil *(In Re Garfinkle)*, 672 F.2d 1340, 1348 (11th Cir. 1982).

Thus, with the bankruptcy proceeding still pending, the appropriate court to address the bankruptcy issue here would be the United States Bankruptcy Court for the Northern District of Illinois which would be subject to direct review. A collateral attack in a state court erroneously limits the legitimate jurisdiction of the bankruptcy court and inappropriately questions the detailed findings of a federal court order.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 11, 1993

93-568

Supreme Court, U.S.
FILED
OCT 12 1993
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ALLIED PRODUCTS CORPORATION,

Petitioner,

v.

RAYMOND RENKIEWICZ, personal representative of the estate of Eugene Renkiewicz, deceased, and JOSEPH and ETHEL L. NORTLEY, copersonal representatives of the estate of Mary Nortley Renkiewicz, deceased,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

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APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS OCTOBER 19, 1992

RENKIEWICZ v. ALLIED PRODUCTS CORPORATION

Docket No. 134931. Submitted July 22, 1992, at Grand Rapids. Decided October 19, 1992, at 9:15 A.M.

Raymond Renkiewicz, as personal representative of the estate of Eugene Renkiewicz, deceased, and Joseph and Ethel Nortley, as copersonal representatives of the estate of Mary Nortley Renkiewicz, brought a products liability action in the Charlevoix Circuit Court against Allied Products Corporation, White Farm Equipment Company, Inc., and others after the decedents died in an accident involving a farm tractor designed, manufactured, and sold by White Farm. Before the accident, White Farm had filed bankruptcy under Chapter 11 of the United States Bankruptcy Code and the bankruptcy court had confirmed a reorganization plan submitted by White Farm and its creditors under which Allied was to acquire the assets of White Farm free and clear of products liability claims. The circuit court, Richard M. Pajtas, J., granted summary disposition for Allied, ruling that the plaintiffs' claims under state law of liability by Allied as the successor of White Farm had been discharged in the bankruptcy proceeding upon confirmation of the reorganization plan. The plaintiffs appealed.

The Court of Appeals held:

State law governing successor liability is preempted by the Bankruptcy Code upon confirmation of a reorganization plan under 11 USC 1141(d) with respect

to claims accruing before confirmation. Liability claims that accrue after confirmation are not preempted by the Bankruptcy Code. The trial court erred in granting summary disposition for Allied.

Reversed and remanded for further proceedings.

PRODUCTS LIABILITY -- BANKRUPTCY -- SUCCESSOR LIABILITY.

The provision of Chapter 11 of the United States Bankruptcy Code that discharges a debtor from any debt that arose before the date of confirmation of a reorganization plan does not preempt state law governing successor liability in situations involving an unaccrued future claim; thus a business that, pursuant to a confirmed Chapter 11 reorganization plan of another business, acquires the assets of the other business free and clear of any claims for products liability may be liable under state law for a dangerous or defective product of the business it acquires where the products liability claim accrues after the bankruptcy court confirms the reorganization plan (11 USC 1141[d]).

Charfoos & Christensen, P.C. (by David R. Parker, Jared P. Buckley, and Scott Rooney), for the plaintiffs.

Harvey, Kruse, Westen & Milan, P.C. (by John A. Kruse, Ronald E. Westen, Phillis F. Snow, and Mark T. Rajt), for the defendant.

Before: NEFF, P.J., and GRIBBS and CAVANAGH, JJ.

GRIBBS, J. Plaintiffs Raymond Renkiewicz, personal representative of the estate of Eugene Renkiewicz, deceased, and Joseph and Ethel L. Nortley, copersonal representatives of the

estate of Mary Nortley Renkiewicz, deceased, appeal as of right an order granting summary disposition to defendant Allied Products Corporation in this products liability case. We reverse and remand for further proceedings.

In 1985, White Farm Equipment Company filed a Chapter 11 bankruptcy petition. As part of that proceeding, defendant Allied Products Corporation purchased substantially all of White Farm's assets, pursuant to an acquisition agreement executed on October 9, 1985. The acquisition agreement provided that defendant Allied would purchase reorganization assets valued at $63,194,000. Excluded assets included a cash account in the amount of $4,600,000, certain receivables in the amount of $6,129,000, certain inventory, and White Farm's interest in certain real estate. In exchange for the transfer of reorganization assets, defendant Allied agreed to issue and deliver to White Farm 340,000 shares of a new series of preferred stock. The liquidation value per share was $50. The agreement specifically provided that the reorganization assets were to be transferred to defendant Allied free and clear of all liens, claims, and encumbrances. On October 31, 1985, the bankruptcy court ruled that White Farm was authorized to immediately consummate the acquisition agreement with Allied.

On November 11, 1987, the bankruptcy court confirmed a plan of reorganization between the official committee of unsecured creditors of White Farm and Borg-Warner Acceptance Corporation. At this time, it appears that the bankruptcy proceeding is still pending.

On December 15, 1987, plaintiffs' decedents were driving a farm tractor along a road in Charlevoix County. The tractor slid off the road and rolled over on its side, killing plaintiffs' decedents. The tractor was designed, manufactured, and sold by White Farm.

In 1989, plaintiffs filed their complaint against Allied, White Farm, and Minneapolis-Moline, alleging products liability, breach of warranty, fraud and misrepresentation, and strict liability. Plaintiffs also filed a complaint against the Charlevoix County Board of Road Commissioners, alleging nuisance and negligence.

Plaintiffs specifically alleged that Allied was the successor corporation of White Farm, and that Allied was liable under Michigan law for any and all damages incurred as a result of the sale of products by White Farm.

Defendant Allied moved for summary disposition, claiming that no liability could be imposed on it for any products liability claim based upon a defect in a White Farm product because it acquired the assets of White Farm in bankruptcy by operation of the United States Bankruptcy Code, which preempts state successor liability law. The trial court granted Allied's motion.

On appeal, plaintiffs contend that the trial court erred when it granted Allied's motion for summary disposition because the Bankruptcy Code does not preempt state law governing successor liability where plaintiff's possessed an unaccrued future claim. We agree.

This is an issue of first impression in the State of Michigan.

The trial court dismissed plaintiffs' products liability claims against Allied because the acquisition agreement between White Farm and Allied, which was approved by the bankruptcy court, specifically provided that Allied was not liable for products liability claims. The trial court held that the bankruptcy court's approval of the agreement was supreme and superseded state tort law. The trial court also relied on the following public policy reasons to support its position:

> With respect to public policy, the bankruptcy court in this case found that White Farm was not going to make that -- it was basically a defunct company and that if it did not prove -- approve the proposed transaction between White Farm and Allied that it would be out of business. And if that were the case, then any past and future tort claimants would be without a remedy. And so the bankruptcy court having approved this contract that provided for no liability for future product liability claims seems to me would be preferable from a public policy standpoint notwithstanding that it may disallow a source of recovery from persons injured by the product involved.
>
> If a prospective purchaser can't go to a defunct company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a Chapter 7 state bankruptcy liquidation.
>
> So it seems to me that as a matter of public policy that the bankruptcy's action in this case would preempt Michigan law.

We will first address pertinent sections of the Bankruptcy Code. 11 USC 105 sets forth the power of the bankruptcy court. Section 105(a) states:

> The court may issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No

> provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Although the bankruptcy court's powers under § 105(a) have been interpreted as being broad, they are not limitless and do not allow the court to override specific mandates of other sections of the Bankruptcy Code. *Lerch v. Federal Land Bank, 94 Bankr 988 (ND Ill, 1989). In re Granger Garage, Inc, 921 F2d 74, 77 (CA 6, 1990)*, the United States Court of Appeals held that "[t]he bankruptcy court is a court of limited jurisdiction." At issue in this case is whether the bankruptcy court had the power to discharge plaintiffs' products liability claim when the court approved the acquisition agreement and confirmed the reorganization plan. 11 USC 101(5)(A) defines a claim as a

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

A broad definition of claim is central to the policy [illegible] start for Chapter 11 debtors and permits debtors to receive the broadest possible relief in bankruptcy court because [illegible] a claim can be discharged only by confirmation of the reorganization plan under § 1141(d). *In re Chateauguay Corp, 87 Bankr 779, 795 (SD NY, 1988)*, rev'd on other grounds *Pension Benefit Guaranty Corp v LTV Corp, 496 US 633, 110 S Ct 2668; 110 L Ed 2d 579, (1990); Johnson v. Home State Bank, 501 US ; 111 S Ct 2150; 115 L Ed 2d 66 (1991)*. Similarly, the term "debt" is to be given a broad and expansive reading. *In re Chase & Sanborn*

Corp, 904 F2d 588 (CA 11, 1990). Debt is defined as "liability on a claim." 11 USC 101(12).

11 USC 1141(d) provides that the confirmation of a reorganization plan discharges the debtor from any debt that arose before the date of confirmation. Section 1141 does not discuss whether debts that arose after the date of confirmation are discharged. The rationale behind discharging preconfirmation claims is that the Bankruptcy Code grants the good-faith debtor freedom from prepetition legal obligations and promises creditors in the confirmed plan of reorganization that a realistic possibility of payment exists. *In re Production Plating, Inc*, 90 Bankr 277, 284 (ED Mich. 1988). Creditors whose claims arise before confirmation will have an opportunity to take part in the reorganization plan and a chance to obtain some sort of remedy.

In the trial court, on its motion for summary disposition, Allied placed great emphasis on the case of *In re White Motor Credit Corp*, 75 Bankr 944 (ND Ohio, 1987) for the proposition that the Bankruptcy Code preempts state laws regarding successor liability. In that case, White Motor filed a voluntary petition under Chapter 11. During the reorganization proceedings, another company, Volvo, agreed to purchase substantially all of White Motor's remaining truck business assets. The court determined that the sale was appropriate and entered an order approving the purchase agreement. The purchase agreement provided that Volvo would not assume any liabilities of White Motors for personal injuries or property damage because of alleged negligence, breach of warranty, or products liability. Despite the provision, lawsuits were filed against Volvo for successor liability resulting from its purchase of the White Motor truck assets. The tort claims arose before plan confirmation and were within the scope of the debtor's discharge. Thus, at issue was "whether state successor liability law [was] preempted by federal law to the extent the claims underlying the successor's liability have been discharged under a plan of reorganization." White Motor, *supra* at 950. The bankruptcy

court held that federal bankruptcy law preempts state laws imposing successor liability, and stated:

> The liability which state law imposes through successor liability is that of the manufacturer. The federal purpose of final resolution and discharge of corporate debt is clearly compromised by imposing successor liability on purchasers of assets when the underlying liability has been discharged under a plan of reorganization. Moreover, successor liability is precluded by Section 1141(c) which specifically frees debtor's property from creditors' claims.
>
> Successor liability in these circumstances has, therefore, been pre-empted by the Bankruptcy Code.
>
> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability. This negative effect on sales would only benefit product liability claimants, thereby subverting specific statutory priorities established by the Bankruptcy code. [Id. at 950-951. Emphasis added.]

The present case is clearly distinguishable from *White Motor*. Here, plaintiffs' claims arose after White Farm filed the petition in bankruptcy and after the bankruptcy court confirmed the reorganization plan. In *White Motor*, on the other hand, the decision dealt specifically with claims that arose before plan confirmation. The distinction is important because under 11 USC

1141(d) only debts that arise before the date of the confirmation of the reorganization plan may be discharged. The *White Motor* court expressly limited its decision to claims that arise before confirmation and are consequently "discharged under a plan of reorganization." Id. at 950. In this case, the record clearly indicates that plaintiffs did not have a claim at the time the reorganization plan was confirmed because their claims did not arise until December 15, 1987, the date of the decedents' fatal accident. In Michigan, a products liability claim does not accrue until an injury occurs. *Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich 146; 200 NW2d 70 (1972); *Larson v. Johns-Manville Sales Corp.*, 427 Mich 301; 399 NW2d 1 (1986). The reorganization plan was confirmed on November 5, 1987, approximately one month before the accident occurred. In accordance with § 1141(d) of the Bankruptcy Code, plaintiffs' claims did not arise before the date of the confirmation, and therefore were not dischargeable by the bankruptcy court.

We find *In re Mooney Aircraft, Inc.*, 730 F.2d 367 (CA 5, 1984), persuasive because it addressed claims that arose after the sale of assets and after the bankruptcy estate was closed. In that case, Mooney Aircraft, Inc., and Mooney Corporation, Inc. (Mooney-Texas), filed applications for bankruptcy pursuant to Chapter 7 of the Bankruptcy Code. On March 14, 1969, American Electronics Laboratories, Inc., purchased all the business assets of Mooney-Texas free and clear of all claims, liabilities, liens, encumbrances, mortgages, and security interests. Subsequently, the assets were sold to the plaintiff, Mooney Aircraft Corporation (Mooney-New Jersey). The bankruptcy estate was closed on March 13, 1972. On November 24, 1973, the defendants' decedents were killed when the aircraft they were flying lost a wing in flight and crashed. The aircraft was manufactured by Mooney-Texas. In November 1974, the defendants filed wrongful death actions against Mooney-New Jersey. On November 7, 1990, Mooney-New Jersey filed an application in bankruptcy court to reopen the estate of Mooney-Texas and a complaint to enjoin the state court proceedings. The

bankruptcy court entered an order permanently enjoining the defendants from pursuing their claims. The district court reversed and Mooney-New Jersey appealed. On appeal, the United States Court of Appeals found that the defendants' claims did not arise until more than five years after the sale and more than a year after the bankruptcy estate was closed. The court held that "[t]he bankruptcy court could not sell free and clear of claims asserted by the victims of an accident which did not occur until five years later." The court concluded that the bankruptcy court lacked jurisdiction over Mooney-New Jersey's complaint. 730 F.2d 375.

Although *Mooney* does not address Chapter 11, the facts in *Mooney* are similar to the facts in this case. Here, the trial court held that the bankruptcy court had jurisdiction over plaintiffs' claims and that plaintiffs' claims were discharged when the bankruptcy court approved the acquisition agreement that provided that the reorganization assets would be transferred to defendant Allied free and clear of all liens, claims, and encumbrances. The trial court failed to take notice of the fact that plaintiffs' claims did not arise until after the confirmation of the acquisition agreement and the plan of reorganization. The *Mooney* Court specifically stated that the bankruptcy court could not sell free and clear of claims asserted by victims of an accident that did not occur until after the confirmation of the sale. In accordance with *Mooney*, the bankruptcy court in the present case did not have jurisdiction to discharge plaintiffs' claims under the acquisition agreement because plaintiffs' claims did not arise until more than a month after the confirmation of the sale of assets and approximately two years after the authorization of the sale of assets.

Because the reorganization plan was confirmed before the time plaintiffs' claims arose, we find plaintiffs' claims cannot be discharged by the bankruptcy court under § 1141(d). As a result, the trial court erred when it granted defendants' motion for summary disposition, holding that the bankruptcy court's ruling

preempted state law governing successor liability in situations involving an unaccrued future claim.

The question we must now answer is whether a record might be developed upon which reasonable minds could differ regarding the existence of successor liability. However, when the trial court granted defendants' motion for summary disposition on the ground that the Bankruptcy Code was supreme and superseded state tort law, it held that there was no need to address whether a continuity of enterprise existed between White Farm and defendant Allied under the theory of successor liability. Because we find that the trial court erred in granting Allied's motion for summary disposition, we reverse and remand to the trial court for further proceedings.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

APPENDIX B

ORDER DENYING REHEARING
JANUARY 4, 1993

Court of Appeals, State of Michigan

ORDER

Janet T. Neff
Presiding Judge

Raymond Renkiewicz v. White Farm Equipment Co.

Docket # 134931

L.C. # 89-039113-NO

Roman S. Gribbs
Mark J. Cavanagh

_____ Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Ella Williams, Chief Clerk, on

January 4, 1993 /s/
Ella Williams, Chief Clerk

APPENDIX C

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL JULY 13, 1993

ORDER
Entered: July 13, 1993

Michigan Supreme Court
Lansing, Michigan

Michael F. Cavanagh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia Boyle
Dorothy Comstock Riley
Robert P. Griffin
Conrad L. Mallett, Jr.
Associate/Justices

95740

RAYMOND RENKIEWICZ, Personal Representative of the Estate of EUGENE RENKIEWICZ, Deceased and JOSEPH and ETHEL L. NORTLEY, Co-Personal Representative of the Estate of MARY NORTLEY RENKIEWICZ, Deceased,

Plaintiffs-Appellees,

v.

ALLIED PRODUCTS CORPORATION, a foreign corporation,

SC: 95740
COA: 134931
LC: 89-039113-NO

Defendant-Appellant.

and

WHITE FARM EQUIPMENT COMPANY INC., formerly known as MINNEAPOLIS-MOLINE, a foreign corporation, and BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF CHARLEVOIX, a municipal corporation, jointly and severally,

Defendants.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals.

Boyle, J., would grant leave to appeal.

80708

SEAL

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

July 13, 1993 /s/

Clerk

APPENDIX D

ORDER OF SUMMARY DISPOSITION BY JUDGE PAJTAS, OCTOBER 25, 1990

ORDER OF SUMMARY DISPOSITION

At a session of said Court held in the County Courthouse in the City of Charlevoix, State of Michigan, on October 8, 1990

PRESENT: HONORABLE: Richard M. Pajtas
CIRCUIT COURT JUDGE

THIS MATTER having come before the Court on the Motion of Defendant Allied Products Corporation and the Court having read the briefs of counsel and having heard the argument of counsel in open Court and being otherwise fully advised in the premises;

IT IS ORDERED, for the reasons stated on the record, this Court finds that the matter is preempted by federal law and therefore grants summary disposition to Defendant Allied Products Corporation.

IT IS FURTHER ORDERED, that there being no just reason for delay, this is a final Order as to Defendant Allied Products Corporation.

/s/
DATE: 10/25/90 Hon. Richard M. Pajtas
CIRCUIT COURT JUDGE

APPENDIX E

EXCERPT OF PROCEEDINGS BEFORE JUDGE PAJTAS, OCTOBER 8, 1990

STATE OF MICHIGAN

33rd CIRCUIT COURT IN
THE COUNTY OF CHARLEVOIX

RAYMOND RENKIEWICZ,

Plaintiff,

v File No. 89-391-13 NO

WHITE FARM EQUIPMENT
CO., INC.,

Defendant.
_____/

EXCERPT OF PROCEEDINGS
BEFORE THE HONORABLE RICHARD M. PAJTAS, CIRCUIT JUDGE
Charlevoix, Michigan - Monday, October 8, 1990

APPEARANCES:

For the Plaintiff: MR. SCOTT T. BEATTY (P24202)
Attorney at Law
101 West Hurlbut
Charlevoix, Michigan 49720
(616) 547-4059

For the Defendant: MR. RONALD E. WESTEN (P22208)
Attorney at Law
1590 First National Building
Detroit, Michigan 48226
(313) 964-3100

Reported by: Lugene D. York, CSR-CER 2892, RPR
Official Court Reporter

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WITNESSES Page

None

EXHIBITS

None

Charlevoix, Michigan
Monday, October 8, 1990
(Except of proceedings.)

THE COURT: I would like to rule on this one.

There was a lengthy agreement, I forget if it was 50 or 100 pages long but it did contain a provision that the Allied Products purchaser was not liable for future product liability claims. The bankruptcy court, which issued a lengthy opinion, approved the contract between White Farm and Allied. The issue, which is narrow, is whether or not that ruling by the Federal Bankruptcy Court preempts and/or supercedes Michigan Products Liability law. And the authority that is available, albeit scant, seems to support the Defendant Allied's position in this case that the ruling that the bankruptcy court is supreme and it supercedes state tort law so that in this particular situation we don't need to get into the Turner and Pelk issues. There's no Michigan case law on point.

With respect to public policy, the bankruptcy court in this case found that White Farm was not going to make that -- it was basically a defunct company and that if it did not prove -- approve the proposed transaction between White Farm and Allied that it would be out of business. And if that were the case, then any past and future tort claimants would be without a remedy. And so the bankruptcy court having approved this contract that provided for no liability for future product liability claims seems to me would be preferable from a public policy standpoint notwithstanding that it may disallow a source of recovery from persons injured by the product involved.

If a perspective purchaser can't go to a defunc company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a Chapter 7 state bankruptcy liquidation.

So it seems to me that as a matter of public policy that the bankruptcy's action in this case would preempt Michigan law.

Other than to rely upon that limited idea of public policy and the limited authority that is available, there's not much basis here to rule in favor of the plaintiff's position. I should say there is no basis here other than the opposite public policy that the plaintiff makes to provide a source of recovery.

So until there is further definitive guidance from the Michigan appellate courts it's my opinion, as it has been the opinion of other trial courts and including the opinion of the Oakland County trial court, that bankruptcy law preempts and the motion for summary disposition should be granted on that basis. So ordered.

MR. WESTEN: And, Your Honor, do you want to enter your order or do you want the order presented to the court? We will be glad to present one, I just wanted to know. Some courts now have -- they enter it on a computer sometimes in Wayne County. But I'll gladly prepare one.

THE COURT: Oh, I see. No. No, I don't have that capability.

MR. WESTEN: Okay.

THE COURT: You should present an order either approved as to form or submit it under the seven day rule.

MR. WESTEN: Thank you.

THE COURT: Thank you very much for your arguments, gentlemen.
(Proceedings concluded.)

STATE OF MICHIGAN)
)
COUNTY OF CHARLEVOIX)

I certify that this transcript, consisting of 5 pages, is a complete, true, and correct transcript of the proceedings taken in this case on October 8, 1990.

November 19, 1990 /s/

Lugene D. York, CSR-CER 2892, RPR
Official Court Reporter
33rd Circuit Court
County Building
Petoskey, Michigan 49770

APPENDIX F

ORDER AUTHORIZING SALE OF ASSETS BY UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, OCTOBER 31, 1985

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
	)	
WHITE FARM	)	
EQUIPMENT COMPANY,	)	NO. 85 B 7532
a Delaware corporation,	)	
	)	
Debtor.	)	

ORDER AUTHORIZING SALE OF ASSETS

I. INTRODUCTION

On September 19, 1985 White Farm Equipment Company ("WFE"), debtor in possession in this chapter 11 proceeding, filed its motion pursuant to 11 U.S.C. §§363(b) and 363(f) ("the WFE Sale Motion") requesting authorization to consummate a proposed acquisition transaction with Allied Products Corporation ("Allied") whereby Allied is to acquire substantially all of WFE's assets, free and clear of liens, claims and encumbrances in accordance with a certain Letter of Intent dated September 11, 1985 and pursuant to specific terms and provisions more fully set forth in a certain "Agreement for Acquisition of Assets of White Farm Equipment Company in Exchange for Preferred Stock of Allied Products Corporation"

("Allied Acquisition Agreement") dated October 9, 1985. In accordance with this court's Order dated September 23, 1985 a notice of the hearing to be conducted upon the WFE Sale Motion was duly transmitted by the Clerk of the United States Bankruptcy Court for the Northern District of Illinois, Eastern division to all creditors and other parties in interest pursuant to Bankruptcy Rules 2002(a) and 6004(a) ("Sale Notice"). The court's September 23, 1985 Order and the Sale Notice fixed October 18, 1985 as the last day for parties in interest to file either objections to the WFE Sale Motion or an appropriate pleading asserting a lien, claim, encumbrance or other alleged property right (i.e., ownership) in the Reorganization Assets (as that term is defined in the Allied Acquisition Agreement). Certain objections and lien claims were timely filed in accordance with this court's September 23, 1985 Order and the Sale Notice, including objections by the Official Creditors' Committee ("Committee"), John T. Grigsby ("Grigsby") the Committee Chairman, the Pension Benefit Guaranty Corporation ("PBGC") and certain former WFE dealers ("Former Dealers"). Both the Former Dealers, and other existing WFE dealers, have timely filed pleadings alleging, inter alia, ownership of certain Reorganization Assets or their proceeds. WFE disputes those allegations. The court has completed a hearing upon the WFE Sale Motion, and objections thereto, during which hearing the court heard and received both oral and documentary evidence submitted by WFE in support of its motion. The court has considered the testimony of Robert Terry, the Senior Vice President of WFE and its Chief Operating Officer; Charles Lunger, an officer of Allied; James Cerone, a certified financial analyst with the firm of Duff & Phelps, Inc. and Sidney Kriser, President of Industrial Plants Corporation ("IPC"). Robert Terry testified as to, inter alia, the financial condition of WFE, its prospects for reorganization, the likely consequences if WFE fails to consummate the Allied Acquisition Agreement, the benefits which will accrue to WFE, its creditors and other parties in interest if WFE is authorized to implement the Allied Acquisition

Agreement and the prior marketing efforts made by WFE and others to sell WFE or obtain a merger partner. Charles Lunger testified as to, inter alia, the existing market conditions, marketing and production schedules which mandate the immediate consummation of the transaction. James Cerone testified as to, inter alia, the value of the Allied Preferred Stock. Sidney Kriser testified as to, inter alia, the liquidation value of certain WFE assets and IPC's prior auction efforts relating to the assets and certain business units of WFE. All exhibits tendered by WFE were received into evidence. Duplicate copies of each of WFE's exhibits have been filed with the court. All parties were afforded an adequate opportunity for cross-examination of WFE's witnesses. No party other than WFE tendered evidence to the court for its consideration. Having heard the testimony, and having reviewed the exhibits, and having taken judicial notice of certain matters of record in this chapter 11 proceeding, and having reviewed the WFE Sale Motion and the extensive memorandum of WFE filed in support thereof, as a reply to sale objections, the court makes the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

A. On May 22, 1985 an involuntary petition under chapter 7 of the Bankruptcy Code was filed against WFE in the United States Bankruptcy Court for the District of Kansas.

B. On June 5, 1985 an Order was entered by the Kansas bankruptcy court transferring venue of this bankruptcy case to this judicial district.

C. On June 24, 1985 WFE converted its bankruptcy case to a proceeding under chapter 11 of the Bankruptcy Code and thereupon became debtor in possession.

D. Robert Terry, WFE's Senior Vice President and Chief Operating Officer, has been designated by this court as

WFE's Responsible Officer in accordance with Bankruptcy Rule 9001(5).

E. At the time WFE's bankruptcy proceeding was initiated WFE was engaged in various business enterprises including the manufacture of forklift trucks in a facility located in Hopkins, Minnesota; the manufacture of farm implements, tractors and related products in facilities located in South Bend, Indiana and Charles City, Iowa; and the operation of a foundry in Charles City, Iowa.

F. WFE sells and distributes its products through a network of independently owned dealers located throughout the United States and Canada.

G. Prior to the initiation of WFE's bankruptcy proceeding Borg-Warner Acceptance Corporation ("BWAC") had given notice of its intent to foreclose its security interests, liens and mortgages, upon WFE's assets and had scheduled a sale of the personal property of WFE pursuant to the provisions of the Uniform Commercial Code, as in effect under applicable state law.

H. BWAC has asserted a claim against WFE (and its property) in an amount in excess of $140 million.

I. BWAC further asserts that its claim is secured by a first and prior lien upon all assets of WFE's estate and has filed a claim to that effect in these proceedings.

J. Due to the initiation of WFE's bankruptcy case, and the imposition of the automatic stay occasioned by 11 U.S.C. §362(a), the prepetition foreclosure sale noticed by BWAC was not held.

K. On June 25, 1985, after notice and hearing, this court authorized WFE to engage IPC to conduct an auction sale of all of the assets of WFE's estate on July 24, 1985.

L. Adequate notice of the July 24, 1985 auction sale was provided to all creditors, potential bidders and other parties in interest.

M. Other than a $2 million bid made by Consolidated Stores, Inc. for WFE's lift truck division located in Hopkins, Minnesota, no acceptable bids were received for any of WFE's business units or assets.

N. After July 24, 1985 WFE continued to operate its business as debtor in possession on a limited basis. At present, WFE is not manufacturing tractors or farm implements and has not manufactured these products since January of 1985.

O. WFE's business operations have been limited, since February of 1985, to the sale and distribution of replacement parts and the production of original equipment component parts for third parties at WFE's Charles City, Iowa foundry.

P. Upon the conclusion of the initial sale proceeding WFE commenced negotiations with Allied for the sale of WFE's business and substantially all of its assets. As WFE's designated Responsible Officer, Robert Terry participated in those arms-length negations with Allied and BWAC over a period of several months.

Q. On September 11, 1985 Allied delivered a Letter of Intent to WFE wherein Allied proposed to purchase substantially all of WFE's assets, excluding cash of $5 million (since reduced to $4.6 million), certain receivables, certain finished products and WFE's interest in certain real estate located

in South Bend, Indiana, free and clear of all liens, claims and encumbrances in exchange for Allied preferred stock having a face value of $17 million to be issued specifically in connection with the WFE acquisition. In addition, WFE's claims and causes of action arising under 11 U.S.C. §§510, 544, 547, 548 and 549 were to be excluded from acquisition by Allied.

R. On September 19, 1985 the WFE Sale Motion was filed. Shortly thereafter, this court entered the aforementioned September 23, 1985 Order and caused the Sale Notice to be transmitted to creditors and other parties in interest in accordance with Bankruptcy Rules 2002(a) and 6004(a).

S. On October 9, 1985 WFE entered into the Allied Acquisition Agreement, subject to its approval by this court.

T. On October 10, 1985 an Order was entered by this court authorizing WFE to consummate the first step of the Allied acquisition transaction, i.e., the sale of WFE's farm implement production business and certain assets pertaining thereto, located in South Bend, Indiana (previously identified in the October 10, 1985 Order as the "South Bend Assets").

U. The value of WFE's remaining business, and therefore its assets, is rapidly deteriorating. For the past several years, WFE has suffered operating losses. It is likely that such losses shall continue unabated.

V. WFE has lost a substantial number of its dealers due to the uncertainty of WFE's continued ability to manufacture inventory.

W. WFE has lost a number of key employees due to the uncertainty of its continued viability.

X. WFE does not have sufficient capital to commence or sustain full operation of its remaining business enterprises.

Y. WFE does not have sufficient capital, nor is there any reasonable likelihood of WFE obtaining sufficient capital, to propose and consummate a chapter 11 plan, absent a sale of its business and assets to a third party.

Z. WFE has not received any bona fide offers for the sale of its business or its assets which are worthy of consideration, other than the Allied offer.

AA. The nature of WFE's primary business, the manufacture and sale of tractors and farm implements, and the market conditions imposed by virtue of that business, requires the immediate consummation of the Allied transaction in order to provide Allied with sufficient lead time to commence new manufacturing and product distribution for the spring selling season.

BB. WFE's remaining dealers do not have a sufficient inventory of tractors or farm implements to offer for sale to consumers. Consequently, WFE is in danger of losing its entire dealer network and customer base.

CC. Consummation of the Allied transaction will result in the maintenance of WFE's dealer network and customer base.

DD. Consummation of the Allied transaction will result in the continuation of WFE's businesses as well as a preservation of WFE's existing labor force.

EE. Consummation of the Allied transaction will result in the elimination of significant liabilities of WFE's estate.

including claims relating to certain product warranties, employee benefits and certain contractual obligations.

FF. Consummation of the proposed transaction will result in the preservation of the value of WFE's existing inventory in the hands of its dealers and consumers.

GG. The value of the Allied preferred stock to be transferred to WFE's estate is, according to the expert testimony of James Cerone, approximately $15 million. Accordingly, the sale consideration appears to be adequate in the circumstances.

HH. Failure to approve the Allied transaction shall result in WFE, and its creditors, losing a lucrative business opportunity.

II. Failure to approve the Allied transaction would result in WFE filing a motion to convert this case to a chapter 7 liquidation proceeding.

JJ. The sale assets have previously been exhaustively exposed to the market place resulting in no acceptable offers, other than the Allied proposal.

KK. No party in interest has either recommended, or evidenced an ability to implement, any alternative to the Allied transaction, other than the forced liquidation of WFE's assets.

LL. Forced liquidation of WFE's assets and the termination of its business operations shall have a negative economic and social effect upon WFE's employees, WFE's existing dealers and the municipality of Charles City, Iowa.

MM. The net liquidation value of the Reorganization Assets (as defined in the Allied Acquisition Agreement) is substantially less than the value of the Allied preferred stock.

NN. The Committee, among others, desires to preserve the issue of the enforceability of BWAC's lien claim.

III. CONCLUSIONS OF LAW

A. This matter is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(M).

B. This court has jurisdiction to authorize consummation of the Allied acquisition transaction pursuant to 28 U.S.C. §§1334(a), 1334(d) and 157(a).

C. This court has specific statutory authority to authorize consummation of the Allied acquisition transaction pursuant to 11 U.S.C. §§105(a), 363(b) and 363(f).

D. Notice of the hearing to be conducted in connection with the WFE sale motion was adequate in the circumstances and consistent with 11 U.S.C. §§102(1) and 363(b) and Bankruptcy Rules 2002(a) and 6004(a).

E. WFE's Sale Motion and the Allied Acquisition Agreement do not constitute a sub rosa chapter 11 plan in that they: (1) do not propose to impair or restructure existing debt or equity interests; (2) do not propose to impair or circumvent creditors' voting rights under a future chapter 11 plan; (3) do not propose to circumvent chapter 11 safeguards such as disclosure requirements; (4) do not propose to have approved an election to assume or reject executory contracts; (5) do not propose to classify claims, cure defaults, extend debt maturities or compromise controversies.

F. The sale price is adequate in the circumstances.

G. Allied is a good faith purchaser within the meaning of 11 U.S.C. §363(m).

H. Sufficient compelling business reasons exist in the particular circumstances of this case to grant the relief requested by the WFE Sale Motion.

I. It is not necessary for this court to reach and decide all of the arguments raised by WFE in its October 25, 1985 Reply to the PBGC's Objection to Sale. This court has concluded that the PBGC's primary argument, that the contractual provision set forth in Paragraph 4.5 of the prior PBGC settlement agreement entered into with, inter alia, WFE and BWAC, does not create an enforceable "restriction on transfer", akin to a property right. The holding of In re McKeague, slip op. (Bankr. D. Haw. 1982) cited by the PBGC to support its argument, is inapposite to the case at bar. The court further concludes that the provisions of the prior PBGC settlement agreement do not supercede this court's authority existing under, and by virtue of, the Bankruptcy Code to approve an appropriate disposition of WFE's assets.

J. The interests, if any, of all unsecured creditors in the sale proceeds, and other assets of this estate shall be adequately protected by virtue of the provisions of the Addendum to this order concerning the disposition of the sale proceeds and other assets of this estate.

K. All parties that have asserted a lien, claim, encumbrance or other property interest, such as ownership, in the Reorganization Assets on or before October 18, 1985 as provided in the Notice of September 19, 1985, are entitled to adequate protection of the value of their respective asserted claims of lien or ownership. Therefore, the net excluded cash, 4.6 million, shall be segregated in a separate interest bearing account and no portion thereof may be disbursed except upon other and further order of this court after hearing upon notice appropriate in the circumstances. All asserted claims of lien, encumbrance or other property right, including ownership, shall attach to and be paid

other and further order of this court after hearing upon notice appropriate in the circumstances. All asserted claims of lien, encumbrance or other property right, including ownership, shall attach to and be paid from the segregated funds to the same extent, and in the same priority, that such claims of lien, encumbrance or other property interest, including ownership, were legally valid and enforceable against the Reorganization Assets. Alleged claims of lien or ownership, other than BWAC's alleged lien claim, aggregate less than $4.6 million. Therefore, the court concludes that no parties' respective alleged property interest (lien or ownership) shall be (or shall be deemed to be) impaired, prejudiced or otherwise affected by virtue of the terms and provisions of this Order or any of the relief granted thereby.

L. Approval of the Allied acquisition transaction in the best interests of WFE, its creditors and other parties in interest.

M. All requests for extensions of time by parties in interest should be denied for the reason that such parties have been afforded an adequate opportunity in the circumstances to file and prosecute their respective objections to the relief requested by the WFE Sale Motion.

N. All objections to the relief requested in the WFE Sale Motion, to the extent they have not been withdrawn, should be overruled and denied for the reasons set forth above.

O. It is necessary and appropriate for this court to retain jurisdiction to, inter alia, interpret and enforce the terms and provisions of this Order (and the Addendum hereto) and to adjudicate, if necessary, any and all disputes concerning rights, title, alleged property interests, including ownership claims, relating to the Reorganization Assets as well as the extent,

validity and priority of all lien claims and other alleged property rights relating to the Reorganization Assets.

IV. DECRETAL PROVISIONS

Based upon the foregoing Findings of Fact and Conclusions of Law it is,

ORDERED, ADJUDGED AND DECREED:

1. WFE is herewith authorized to enter into, and immediately consummate the Allied Acquisition Agreement, as amended by the First Amendment to the Allied Acquisition Agreement, a copy of which First Amendment is annexed hereto as Exhibit A.

2. WFE is herewith authorized to immediately execute and deliver all documents reasonably necessary to implement the Allied Acquisition Agreement.

3. All objections to the WFE Sale Motion; and the relief requested therein, are denied.

4. All requests for an extension of time within which parties in interest may file and prosecute objections to the WFE Sale Motion, and the relief requested therein, are denied.

5. Except as otherwise provided in the Allied Acquisition Agreement the Reorganization Assets shall immediately be transferred to Allied free and clear of all liens, claims and encumbrances.

6. The Addendum to this Order is approved and incorporated herein by this reference.

7. This court retains jurisdiction (1) to interpret and enforce the terms of this Order and the terms of the Allied Acquisition Agreement; (2) to adjudicate all issues concerning liens, claims, encumbrances and alleged ownership interests with respect to the Reorganization Assets, including the extent, validity, enforceability and priority of all such liens, claims, encumbrances and alleged ownership interests. Such alleged ownership interests to include, but not be limited to, the claims of Former Dealers to superior rights in proceeds of the sale of the Reorganization Assets by reason of ownership of a part of such assets (inventory) or by reason of an express, implied or constructive trust imposed upon a part of such assets or upon the proceeds thereof; (3) to adjudicate all issues concerning WFE's right, title or interest in the Reorganization Assets and the sale proceeds; (4) to adjudicate all remaining issues concerning WFE's right to transfer title to the Reorganization Assets; (5) to condition, approve or disapprove any election made by WFE concerning WFE's election to assume or reject any unexpired lease or other executory contract pursuant to 11 U.S.C. §365, as a necessary incident to implementation of the Allied Acquisition Agreement.

8. The Excluded Cash Segregated Fund (as that term is defined in the Allied Acquisition Agreement) shall be deposited in a segregated interest bearing impressed account, in the name of WFE in its fiduciary capacity, and no part thereof shall be disbursed without other and further order of this court after notice and hearing appropriate in the circumstances. All liens, claims, encumbrances or alleged ownership interests asserted on or before October 18, 1985, shall attach to the aforesaid Excluded Cash Segregated Fund to the same extent, and in the same priority that such liens, claims, encumbrances or alleged ownership interests are held to be valid and enforceable against the Reorganization Assets by an appropriate order of this court. The Excluded Cash Segregated Funds shall be used to, inter alia, satisfy (disburse funds equal to the adjudicated value

of such property interests) to the extent such liens, claims, encumbrances or alleged ownership interests are held to be valid, enforceable, superior and paramount to both the asserted BWAC lien interests and the interests of WFE as debtor in possession under, e.g., 11 U.S.C. §544, by the aforesaid appropriate court order, provided however, WFE reserves its right to return the exact (if identifiable), or equivalent, inventory to the Former Dealers, or other persons asserting ownership interests in the Reorganization Assets.

9. A continued status hearing concerning trial procedures and briefing schedules relating to claims of lien and ownership shall be conducted on November 14, 1985 at nine-thirty in the morning, or as soon thereafter as counsel may be heard in this court.

ENTER FOR THE COURT:

Dated: 10/31/85 BY: /s/
Honorable John B. Schwartz,
Bankruptcy Judge

No. 93-568

Supreme Court, U.S.
FILED
NOV 9 1993
CLERK

In The

Supreme Court of the United States

October Term, 1993

ALLIED PRODUCTS CORPORATION,
a foreign corporation,

Petitioner,

v.

RAYMOND RENKIEWICZ, Personal Representative of the Estate of EUGENE RENKIEWICZ, Deceased and JOSEPH and ETHEL L. NORTLEY, Co-Personal Representatives of the Estate of MARY NORTLEY RENKIEWICZ, Deceased,

Respondents,

and

WHITE FARM EQUIPMENT COMPANY, INC., formerly known as MINNEAPOLIS-MOLINE, a foreign corporation, and BOARD OF COUNTY ROAD COMMISSIONERS FOR THE COUNTY OF CHARLEVOIX, a municipal corporation, jointly and severally,

Defendants.

Petition For Writ Of Certiorari To The Court Of Appeals Of Michigan

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether this Court should deny certiorari in a case involving a state law interpretation of the state's principles of successorship liability?

Whether the Michigan Court of Appeals correctly determined that, as to Petitioner Allied, the Orders of the Bankruptcy Court could not have been interpreted as allowing Allied to take free and clear of the yet to be in existence claim of the Renkiewiczes, inasmuch as the Renkiewiczes' claim did not arise until a month after the plan was confirmed and Allied was operating its business as a successor corporation?

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INTRODUCTION

There are several reasons why this Court should deny the Petition. First, the essential question decided by the Michigan Court of Appeals, from which certiorari is sought, is a question of successor corporate liability under Michigan state law. Second, both the Michigan Court of Appeals and the Michigan Supreme Court, in their respective decisions, recognize that this case is not yet ripe for adjudication. Defendants moved for summary disposition before any discovery was done, far in advance of any fact finding by a court or a trier of fact. As such, the case is not yet ripe for adjudication. Third, the Court of Appeals made the correct decision. As to Petitioner Allied (as opposed to the Bankrupt, White Farm Equipment), the contact with the bankruptcy proceedings as purchaser of assets was completed prior to the date on which the Renkiewiczes were injured. As such, Allied could not have taken the assets free and clear of a claim which had yet to come in existence, unless some extraordinary measure was taken (as in the Dalkon Shield and asbestos bankruptcies) to have some sort of representation during the acquisition process of future, as yet unaccrued claims. Inasmuch the Renkiewiczes were not represented in any way prior to the confirmation of the plan and Allied's assumption of control over the assets of the predecessor corporation, under any existing definition of claim under the Bankruptcy Code, there was no claim in existence as of the time of the court order for Allied to take free and clear of.

For any of these reasons, this Court would be correct in denying Respondents' Petition for Certiorari.

COUNTER-STATEMENT OF THE CASE

On December 15, 1987, plaintiff's decedent, Eugene Bernard Renkiewicz and his wife, Mary Margaret Renkiewicz were driving a farm tractor along Quarterline Road in Charlevoix County, Michigan. The road was slick and slippery; the tractor began to slide off the road on a small slope near Burgess Road. The embankment off the shoulder of the road was unguarded by a guardrail; when the tractor left the road it rolled over on its side, killing plaintiffs' decedents.

The tractor in question, a Minneapolis-Moline A4T-1600 1973 four wheel drive tractor model number N855-C250, reference number 33985, engine number 713193, was designed, manufactured and sold by defendant White Farm Equipment Company.

The link between White Farm Equipment Company and the current defendant-appellee, Allied Products, is set forth in an affidavit of David B. Corwine, General Counsel and Assistant Secretary for Allied Products Corp., submitted to the trial court as part of defendant's motion for summary disposition. In that affidavit, Mr. Corwine relates that, in 1985, White Farm Equipment Company went into Chapter 11 bankruptcy. As part of that proceeding, Allied Products purchased "certain assets of White Farm Equipment Company, pursuant to an asset purchase agreement, executed October 9, 1985." Those "certain assets", according to the acquisition agreement, are defined as "all of the assets, properties, rights and business of White of every type and description."

Further, Allied kept the White Farm employees but simply negotiated and executed a new labor contract with them. The acquisition agreement also specifically stated that:

> "White will use its best efforts to preserve its business organization intact and to keep available to Allied the services of its present officers, employees, sales representatives, and agents, and to preserve the good will of suppliers, dealers, and others having business relations with them or Allied."

The bankruptcy court order which approved the acquisition of the "certain assets" of White Farm by Allied, also submitted as part of defendant's motion, stated as follows:

> "On September 19, 1985, White Farm Equipment Company ('WFE'), debtor in possession in this Chapter 11 proceeding, filed its motion pursuant to 11 USC §§ 363(b) and 363(f) ('the WFE sale motion') requesting authorization to consummate a proposed acquisition transaction with Allied Products Corporation ('Allied') whereby Allied is to acquire *substantially all* of WFE's assets, free and clear of liens, claims and encumbrances, in accordance with a certain letter of intent dated September 11, 1985, and pursuant to specific terms and provisions more fully set forth in a certain 'agreement for acquisition of assets of White Farm Equipment Company in exchange for preferred stock of Allied Products Corporation' ('Allied acquisition agreement') dated October 9, 1985."

The bankruptcy court made clear that Allied was contemplating a purchase of White Farm Equipment Company as an ongoing business, rather than as the sum

total of its fixtures, buildings and other properties, in the following paragraphs:

> "Y. WFE does not have sufficient capital, nor is there any reasonable likelihood of WFE obtaining sufficient capital, to propose and consummate a Chapter 11 plan, absent a sale of its business and assets to a third party.
>
> Z. WFE has not received any bonafide offers for the sale of its businesses or its assets which are worthy of consideration, other than Allied offer.
>
> AA. The nature of WFE's primary business, the manufacture and sale of tractors and farm implements, and the market conditions imposed by virtue of that business, requires the immediate consummation of the Allied transaction in order to provide Allied with sufficient lead time to commence new manufacturing and product distribution for the spring selling season.
>
> BB. WFE's remaining dealers do not have a sufficient inventory of tractors or farm implements to offer for sale to consumers. Consequently, WFE is in danger of losing its entire dealer network and customer base.
>
> CC. Consummation of the Allied transaction will result of the maintenance of WFE's dealer network and customer base.
>
> DD. Consummation of the Allied transaction will result in the continuation of WFE's businesses as well as a preservation of WFE's existing labor force.
>
> EE. Consummation of the Allied transaction will result in the elimination of significant

> liabilities of WFE's estate, including claims related to certain product warranties, employee benefits and certain contractual obligations.
>
> FF. Consummation of the proposed transaction will result in the preservation of the value of WFE's existing inventory in the hands of its dealers and consumers."

In the order authorizing the sale, the trial court noted that it had previously issued an order on September 23, 1985, which set October 18, 1985 as the last day "for parties in interest to file either objections to the WFE sale motion or an appropriate pleading asserting a lien, claim, encumbrance or other alleged property right . . . in the reorganization assets." Some objections were filed, but were deemed insufficient, in light of the court's finding of facts, to prevent the proposed sale of assets.

In the acquisition agreement referenced to by the bankruptcy court, Allied sought to disclaim liability for any product liability claims relating to White Farm products with the following contractual language:

> "Without limiting the generality of the foregoing, Allied does not assume and shall not be liable for product liability claims for any products manufactured by White prior to the final closing date, liabilities to employees or former employees of White arising out of their employment by White prior to the final closing date except accrued DIP employee claims, liabilities to dealers, and liabilities for state and federal taxes, personal property taxes, and sales and use taxes."

Certain product liability claims which had already accrued were delivered to Allied by White on a schedule

which set forth the nature, amount and disposition thereof.

After the confirmation of the sale, the bankruptcy proceedings against the remnants of White Farm continued. After the confirmation of the sale, the bankruptcy court established March 31, 1986 as the bar date for anyone to file a claim against the remnants of White Farm Equipment. All claims filed after March 31, 1986 were rejected as untimely. As the Michigan Court of Appeals opinion noted, the bankruptcy court confirmed the total plan filed by the official committee of unsecured creditors on November 11, 1987. As previously stated, the Renkiewiczes did not have any claim against either White Farm or Allied Products prior to December 15, 1987.

Since that time, Allied Products has continued the business of White Farm Equipment Company. In fact, Allied has adopted, through its advertising, the names of "Minneapolis-Moline" and "White Farm."

PROCEDURAL HISTORY

Respondents filed their complaint in 1989 against petitioner Allied Products Corp. and defendants White Farm Equipment Company, Minneapolis-Moline and Board of County Road Commissioners for the County of Charlevoix. As against White Farm, Minneapolis-Moline and Allied, plaintiffs brought claims of product liability, breach of warranty, fraud and misrepresentation and strict liability. As against the Board of County Road Commissioners, plaintiffs brought allegations of nuisance and negligence. As against petitioner Allied Products Corp.,

respondents specifically alleged that it was the successor corporation of defendant White Farm Equipment Company, and that it was liable under Michigan law for any and all damages incurred as a result of the sale of products by defendant White Farm Equipment Company.

Defendant Allied Products Corp. immediately moved for summary disposition. The trial court, after briefing and argument, granted the motion.

Respondents appealed to the Michigan Court of Appeals. Oral argument was had, and in a published opinion, *Renkiewicz v Allied Products Corp*, 196 Mich App 309; 492 NW2d 820 (1992), the Court of Appeals reversed the trial court. After analyzing the applicable bankruptcy code provisions, and the case law interpreting them, the Court of Appeals held as follows:

> "Because the reorganization plan was confirmed before the time plaintiffs' claims arose, we find plaintiffs' claims cannot be discharged by the bankruptcy court under [11 USC] § 1141(d). As a result, the trial court erred when it granted defendant's motion for summary disposition, holding that the bankruptcy court's ruling preempted state law governing successor liability in situations involving an unaccrued future claim."

The Court of Appeals then prudently deferred any decision on the issue of successorship liability itself:

> "The question we must now answer is whether a record might be developed upon which reasonable minds could differ regarding the existence of successor liability. However, when the trial court granted defendant's motion for summary

> disposition on the ground that the bankruptcy code was supreme and superseded state tort law, it held that there was no need to address whether a continuity of enterprise existed between White Farm and defendant Allied under the theory of successor liability. Because we find that the trial court erred in granting Allied's motion for summary disposition, we reverse and remand to the trial court for further proceedings." *Id* at 318-319.

Petitioner thereafter moved for rehearing in the Court of Appeals, which motion was denied. Petitioner then applied to the Michigan Supreme Court for leave to appeal. The Supreme Court denied defendants' application, for the specific reason that the Court would not review the question presented prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals. Defendant now brings the instant Petition for Writ of Certiorari to this Court. For the reasons set forth in the following brief, that Petition should be denied.

SUMMARY OF ARGUMENT

The reasons why this Court should not grant certiorari in the instant case are set forth in the instant brief. First, the Michigan Court of Appeals' decision was essentially one of state law. The issue is whether Allied is to be held liable, as a successor corporation to White Farm, for a defective product sold by White Farm, which defect caused the plaintiffs' deaths. This inquiry is governed by Michigan law, which in turn depends on the application

of factual tests. As such, this is a state decision resting primarily upon state tort law, which should not be reviewed by this court. Second, the issue is not yet ripe for adjudication. Both the Michigan Court of Appeals and the Michigan Supreme Court recognized that, in order to properly adjudicate the issues presented, further factual development was necessary, inasmuch as defendant's motion was made immediately after the pleadings, and before any discovery had been conducted. The issues presented by defendant, even if meritorious, are not yet ripe for review by this court. Third, the Michigan Court of Appeals made the correct decision. The application of bankruptcy law is not applied in this case to the bankrupt, White Farm, but to the purchaser of assets in bankruptcy, Petitioner Allied. It is undisputed that all orders relating to Allied's acquisition of nearly all of White Farm's assets, including the court order authorizing White Farm to take "free and clear of claims", were entered prior to the date on which the product resulted in the Renkiewiczes deaths. As such, even under the most expansive definition of the word "claim", there is no authority for the proposition that the Bankruptcy Court had the power to grant Allied freedom from claims which had not yet come into existence. There is a limited exception which is currently still being hashed out relating to mass tort situations, in areas such as Dalkon Shield and asbestos, but in these cases, provision was made for after-arising claims, and representation of as yet unaccrued claimants was provided for during the bankruptcy proceedings. Neither of these safeguards were in place here. Allied cannot claim the protection of a bankruptcy court

order which did not any way allow for the participation of the Renkiewiczes or someone standing in the shoes.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTION OF LIABILITY OF SUCCESSOR CORPORATIONS, HOWEVER THE ASSETS ARE ACQUIRED, IS A STATE LAW MATTER

A. THE QUESTION OF STATE SUCCESSOR CORPORATION LIABILITY FOR AN ENTITY NOT ITSELF SEEKING BANKRUPTCY PROTECTION IS A STATE QUESTION, NOT A FEDERAL ONE.

This Court has consistently adhered to the principle that a state court judgment, based upon an adequate and independent nonfederal or state ground, will not be disturbed even though a federal question is involved, and even though that federal question is arguably wrongly decided. *Berea College v Kentucky*, 211 US 45, 53 (1908). This court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. *Zacchini v Scripps Howard Broadcasting Company*, 433 US 562, 566 (1977).

Here, plaintiff made out a prima facie case for the imposition of successorship liability under *Turner v Bituminous Casualty Company*, 397 Mich 406; 244 NW2d 873 (1976). The leading Michigan case on point, as it relates to the role of a bankruptcy court in the purchase of assets, is *Pelc v Bendix Tool Machine Corp*, 111 Mich App 343; 314 NW2d 614 (1981). In *Pelc*, despite the fact that the

successor corporation in *Pelc* acquired the assets through a bankruptcy liquidation, the Court of Appeals found it unnecessary to address the federal issues to decide the question, but rather, interpreted state law successor corporate liability issues. *Id* at 356.

This has also been the experience in other states. For instance, California has established judicially a regime of successor corporate liability in *Ray v Alad*, 19 Cal 3d 22; 136 Cal Rptr 574 (1977). A recent California case, *Stewart v Telex Communications, Inc*, 1 Cal App 4th 190; 1 Cal Rptr 2d 669 (1991), by reference to state law, established a rule as to the role of bankruptcy court proceedings in transfer of assets from a predecessor corporation to a successorship corporation. Three of the cases relied upon by petitioner as authority in federal bankruptcy interpretation, *Nelson v Tiffany Industries*, 778 F2d 533 (9th Cir 1985), *Conway v White Trucks*, 692 F Supp 442 (MD Pa 1988), aff'd, 885 F2d 90 (3d Cir 1989), and *Wallace v Dorsey Trailers Southeast*, 849 F2d 341 (8th Cir 1988) were also actually decided on state successorship law. No state has applied federal law in determining the liability of successorship corporations, even in cases where there is bankruptcy court participation in the transfer of assets.

This is proper in that it is not Allied which is seeking relief in bankruptcy – Allied is a thriving, ongoing business subject to state tort law as any other business. This Court should decline the opportunity to visit this area of state tort law merely because of the incidental presence of a bankruptcy court proceeding. Petitioner's Writ of Certiorari should be denied.

B. BECAUSE BOTH THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN SUPREME COURT REMANDED THIS CASE BACK FOR FACT FINDING, THE CASE IS NOT RIPE FOR ADJUDICATION BY THIS HONORABLE COURT.

As noted in the Appendix of Petitioner, the Michigan Court of Appeals decision rested, in part, upon the fact that no record was developed upon which reasonable minds could determine the existence of successor liability. Appendix of Petitioner at A-11. In the Order denying application for leave to appeal, the Michigan Supreme Court ruled that it was "not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals." *Id* at C-2.

Here, the fact of continuing state proceedings, which are essential to determine the presence or absence of successor corporate liability, render any review by this Court as premature. Further state proceeding may help avoid fragmenting and prolonging the litigation, and may in fact cause this Court to make a determination lacking later developed facts as may be ascertained through discovery. *North Dakota State Board of Pharmacy v Snyder's Drug Stores*, 414 US 156, 159 (1973)

II. BECAUSE EVERYTHING NECESSARY TO ACCOMPLISH THE TRANSFER OF ASSETS TO ALLIED HAD BEEN ACCOMPLISHED PRIOR TO THE RENKIEWICZES FATAL ACCIDENT, THE PETITIONER COULD NOT HAVE TAKEN THE ASSETS FREE AND CLEAR OF THE RENKIEWICZ'S CLAIM.

As properly found by the Court of Appeals, both the language of the federal bankruptcy code, and practice and case law thereunder mandate the result in this case. Where the entirety of a claim arises regarding the product of a bankrupt entity after all dispositive orders of the court have been entered regarding claims against that entity, whether in a winding down, or in a purchase of assets of a business under Chapter 11, the claim cannot have been discharged or limited in any fashion by any order of the bankruptcy court in the previous proceedings. Although the claim need not be liquidated, or even in a collectible form, it must be, at the very least, pending or in existence. Although limited exception has been made in a few mass tort situations, such was only done after representation was provided to future claimants, and provision made for some sort of remedy. Such was not provided for here, and the Court of Appeals correctly concluded that plaintiff's claim could be asserted against the successor corporation, if such could be established.

It is petitioner's position that because it purchased White Farm Equipment in a Chapter 11 sale approved by a bankruptcy court, that it therefore assumed no liability for any future product liability claims arising out of use of products previously sold by White Farm Equipment. This is an improper expansion of bankruptcy law; it

would have the effect of granting to bankruptcy courts a power not specifically or impliedly granted them by Congress in the bankruptcy code. Accordingly, defendant's argument must fail, no matter how laudible the policy it might arguably further.

The bankruptcy court only has the power to carry out the provision of that part of the bankruptcy code in effect at the time it renders its decisions. *In re Amatex Corp*, 755 F2d 1034 (3d Cir 1985). The applicable bankruptcy code in existence at the time of the decision regarding Allied's acquisition of White Farm Equipment was the 1984 act. Under this act, the following definitions were in existence: Section 101 of the bankruptcy code, 11 USC §101, provided as follows:

> "(4) Claim means – (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> * * *
>
> (9) Creditor means – (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> * * *
>
> (11) Debt means liability on a claim."

In the bankruptcy court hearing in *In re Amatex Corp*, 30 BR 309 (Bkrtcy ED Pa 1983), the court cited Congressional history in determining that a court had no power to discharge as yet unaccrued claims of potential future tort claimants, stating:

> "Valuable information may be gleaned from an examination of the legislative history of the foregoing code provisions. Concerning the definitions of the term "creditor" and "debt", the legislative history provides as follows:
>
> > 'Creditor is defined to include only holders of pre-petition claims against the debtor. However, it encompasses certain holders of claims that are deemed to arise before the date of the filing of the petition, such as those injured by the rejection of an executory contract or unexpired lease, certain investment tax credit recapture claim holders, involuntary gap creditors, and certain holders of the right of setoff. The term also includes the holder of a pre-petition community claim. A guarantee of or surety for a claim against a debtor will also be a creditor, because he will hold a contingent claim against a debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured.
>
> > * * *
>
> > Debt is defined in paragraph (11) as a liability on a claim. The terms are co-extensive: A creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor.'
>
> [House Report No. 95-595, 95th Cong 1st Sess 309-310 (1977); see Senate Report No. 95-989,

> 95th Cong 2d Sess 22-23 (1978), US Code Cong & Admin News 1978, pp 5787, 5808-09, 6266-67]." *Id* at 315.

This result was modified in the appellate decision in *Amatex*. The Third Circuit reversed the bankruptcy court insofar as the bankruptcy court ruled, because there could be no discharge of as yet unaccrued future claims, that the future claimants were not entitled to a representative in a bankruptcy proceedings. However, the court did not overrule that part of the bankruptcy court's decision standing for the proposition that future unaccrued tort claims cannot be discharged by a bankruptcy court:

> "Bankruptcy Judge King based his recommendation to deny Amatex's motion to appoint a legal representative for future claimants on a determination that such individuals as yet had no cognizable claims under the code. Therefore, he believed, future claimants are not "creditors: and their claims may not be discharged, or even affected, in a reorganization plan. We need not reach the merits of these conclusions in order to ascertain that future claimants do have a sufficient interest to require some representation during the reorganization proceedings. Whether or not future claimants have claims in the technical bankruptcy sense that can be affected by a reorganization plan, such individuals clearly have a practical stake in the outcome of the proceedings." *In re Amatex Corp*, 755 F2d 1034, 1041 (3d Cir 1985).

Thus, the *Amatex* appellate court decision had the effect of providing even greater protection to future

claimants by allowing them representation at the proceedings. In the instant case, no such representation existed. No one spoke on behalf of future claimants, whose rights Allied sought to foreclose before such rights came into existence. The bankruptcy court had no power to do so under the code.

Although the *Amatex* case is instructive, numerous cases also discuss potential future claims which had yet to accrue by the date of the finalization of the bankruptcy. These cases hold that in order for a debt to be discharged in the bankruptcy, the debt must be in existence prior to the date that the bankruptcy is finalized. Otherwise, such is a mere contingent claim. *In re Pacor, Inc*, 110 BR 686 (ED Pa 1990). See also, for example, *Matter of Pyles*, 38 BR 92 (WD Mo 1984); *In re Ford*, 87 BR 641 (D Nev 1988); *Behrens v Woodhaven Association*, 87 BR 971 (ND Ill 1988).

In Michigan, a products liability claim does not accrue until some injury occurs. *Connolly v Paul Ruddy's Equipment Company*, 388 Mich 146; 200 NW2d 70 (1972); *Larson v Johns-Manville Sales Corp*, 427 Mich 301; 399 NW2d 1 (1986). To say that an owner of a tractor, even if that owner could prove that the tractor was negligently designed, could bring suit for potential, but yet to occur, future injuries is ludicrous. Yet that is the position petitioner is taking in claiming that the bankruptcy court had the power to discharge such a future, unaccrued claim by any order issued between 1985 and 1987.

Petitioner's claim is further undermined by the fact that the overwhelming majority of the cases it relies upon actually involved claims which arose either prior to filing

of bankruptcy, or, at the latest, prior to the final confirmation of the sale of assets or reorganization. In *American Living Systems v Bonapfel* (In re All-American of Ashburn, Inc), 56 BR 186 (ND Ga 1986), aff'd on the other gds, 805 F2d 1515 (11th Cir 1986), the claim arose prior to the date of the sale to the purchasing corporation. Similarly, the claim arose prior to the sale of assets in *Forde v Kee-Lox Manufacturing*, 437 F Supp 631 (WDNY 1977), aff'd on other gds, 584 F2d 4 (2d Cir 1978), *In re Korhumel Industries*, 103 BR 917 (ND Ill 1989), and *Volvo White Truck Corp v Chambersburg Beverage Inc* (In re White Motor Corp), 75 BR 944 (ND Ohio 1987). Many of the cases relied upon by defendant involved claims which were held to have arisen prior to the filing of bankruptcy, much less the approval of a confirmation plan. Falling into this category are *In re Chateaugay Corp*, 112 BR 513 (SDNY 1990), aff'd 944 F2d 997 (2d Cir 1991), *Roach v Edge* (In re Edge), 60 BR 690 (MD Tenn 1986) and *Rubinstein v Alaska Pacific Consortium* (In re New England Fish Company), 19 BR 323 (WD Wash 1982).

In two mass tort situations, involving the notorious Dalkon Shield and various manufacturers of asbestos products, a unique remedy was fashioned to achieve the sometimes divergent goals of finality and protection of future claimants. In *Grady v A H Robins Company*, 839 F2d 198 (4th Cir 1988), cert dismissed sub nom *Joynes v A H Robins, Inc*, 487 US 1260 (1988), a legal representative was appointed for future tort claimants. A similar voice was provided to future asbestos victims in the *Amatex* case, as well as the related asbestos case of *In re UNR Industries*, 19 BR 741 (ND Ill 1983), appeal dismissed, 725 F2d 1111 (7th Cir 1984) on rem, 46 BR 671 (ND Ill 1985).

The only cases which are on point, are the same ones which were discussed in the Michigan Court of Appeals: The District of Maine's decision in *Paris Manufacturing Corp v Ace Hardware Corp*, 132 BR 504 (D Me 1991), which supports petitioner's position, and *Mooney Aircraft Corp v Foster* (In re Mooney Aircraft, Inc,) 730 F2d 367 (5th Cir 1984) and *Schweitzer v Consolidated Rail Corp*, 758 F2d 936 (3d Cir), cert den sub nom *Reading Company v Schweitzer*, 474 US 864 (1985). Comparing these cases, the better view is that of *Mooney* and *Schweitzer*. The Renkiewicz's claim did not arise, under Michigan law or under the Bankruptcy Code, prior to the date on which the bankruptcy court confirmed the plan which included the sale of virtually all the assets of the bankrupt to petitioner, the successor corporation. Respondents did not participate in these proceedings, and under bankruptcy law or Michigan law, could not have. The court did not appoint any representative to speak on behalf of future tort claimants whose claims had yet to accrue. Under these facts, the Michigan Court of Appeals made the only decision it could have: It allowed respondents' suit to proceed against petitioner if a case could be made out under Michigan successor corporation law.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to the Court of Appeals of Michigan.

Respectfully submitted,

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